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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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10 Manuel Bernal, husband, individually) No. CV09-1502 PHX-DGC
11 and on behalf of Kevin Bernal, their)
minor son, et al.,)
12 Plaintiffs,) **ORDER**
13 vs.)
14 Daewoo Motor America, Inc., a)
Delaware corporation, et al.,)
15 Defendants.)
16 _____)

17 Plaintiffs Manuel, Paula, and Christopher Bernal (“the Bernals”), on behalf of
18 themselves and others, filed a claim against Defendants Daewoo Motor America, Inc.,
19 Daewoo Motor Co., Ltd. (collectively “Daewoo”), and other Defendants. Dkt. #1. Daewoo
20 filed an answer (Dkt. #16) and the Bernals have moved to strike the affirmative defenses and
21 demands in Daewoo’s answer (Dkt. #19). The motion is fully briefed. For the reasons that
22 follow, the Court will grant in part and deny in part the Bernals’ motion.

23 **I. Background.**

24 The Bernals, who are Arizona residents, purchased a 2000 Daewoo Leganza in
25 Arizona. Dkt. #22 at 4.¹ On July 28, 2007, while driving in Mexico, the Bernals were
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27 ¹ Citations to pages in the parties’ filings will be to the page numbers applied by the
28 Court’s electronic docket at the top of each page, not to the numbers at the bottom of each
page of a document.

involved in a rollover accident. Dkt. #19 at 2; Dkt. #20 at 2. The Bernal's allege that "[d]uring the rollover, the [v]ehicle's roof buckled," causing substantial injuries to them and fatal injuries to Manuel Bernal's mother-in-law who was also in the vehicle. Dkt. #19 at 2. On July 21, 2009, the Bernal's filed the present case against Daewoo and others, asserting claims for product liability, wrongful death, breach of warranty, failure to warn, and loss of consortium, as well as claims under the Arizona survival statute. Dkt. #1. On September 1, 2009, Daewoo filed its answer, which included 17 affirmative defenses and a demand for attorneys' fees. Dkt. #16. The Bernal's have moved to strike all affirmative defenses and the demand. Dkt. #19.

II. Arizona law applies.

"In a diversity case, the district court must apply the choice-of-law rules of the state in which it sits." *Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). Arizona has adopted the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws. *See Bates v. Super. Ct.*, 749 P.2d 1367, 1369 (Ariz. 1988); *Garcia v. Gen. Motors Corp.*, 990 P.2d 1069, 1075-76 (Ariz. App. 1999). Under this test, the Court must apply the law of the state that has the most significant relationship to the cause of action. *Garcia*, 990 P.2d at 1075-76. To determine which state has the most significant relationship, the Court must consider (1) where the injury occurred, (2) where the conduct causing the injury occurred, (3) the domicile and residence of the parties, and (4) where the relationship between the parties is centered. *Id.* at 1076. "Arizona courts traditionally have accorded great weight in the conflicts analysis to the domicile of the tort victim in a personal injury case." *Id.*

The Bernal's argue that the Court should apply Arizona law, while Daewoo argues that "the law of forum where this accident occurred will govern." Dkt. #20 at 3. The Court agrees with the Bernal's. Two important factors weigh in favor of applying Arizona law: (1) the Bernal's are domiciled in Arizona, and (2) they purchased their vehicle here. Dkt. #22 at 4. The only factor that favors Mexico is that the accident occurred there, and this factor "loses significance if the place of injury is merely fortuitous" as it is here. *Garcia*, 990 P.2d

1 at 1076. Several Arizona courts have chosen to apply Arizona law, and not the law of the
2 state where the accident occurred, in circumstances much like this. *See, e.g., id.; Baroldy v.*
3 *Ortho Pharm. Corp.*, 760 P.2d 574, 578-79 (Ariz. App. 1988) (applying Arizona law even
4 when three of the four factors weighed against application of Arizona law); *Moore v.*
5 *Montes*, 529 P.2d 716, 720-21 (Ariz. App. 1974).

6 In addition, the Court must consider “(1) the needs of the interstate and international
7 systems, (2) the relevant policies and interests of the competing forums, (3) the protection
8 of justified expectations, (4) the basic policies underlying the field of law, (5) the certainty,
9 predictability, and uniformity of result, and (6) the ease of determining and applying the law
10 of the particular forum.” *Garcia*, 990 P.2d at 1077. Daewoo has not asserted that the law
11 of Mexico should be applied based on these factors. Given that Mexico’s only contact with
12 this litigation is that the accident occurred there, the Court does not find that the needs of
13 Mexico or its policies demand that Mexican law be applied. *See Moore*, 529 P.2d at 720-21.
14 The Bernals are not Mexican residents, Daewoo is not a Mexican corporation, and the
15 litigation does not concern Mexico’s traffic laws or tort policies. Arizona is clearly more
16 central to this litigation. The Bernals are Arizona residents, Daewoo does business here, and
17 the Bernals purchased their vehicle here. Arizona certainly has an interest in protecting its
18 citizens under its laws and policy rationales. As a result, this Court finds that Arizona law
19 should be applied in this case.

20 **III. Daewoo’s affirmative defenses.**

21 The Bernals ask the Court to strike all of Daewoo’s affirmative defenses. Dkt. #19.
22 While the Court may strike insufficient defenses pursuant to Rule 12(f), “[m]otions to strike
23 are viewed negatively because of the limited import of the pleadings under the Federal
24 Rules.” *Netflix, Inc. v. Blockbuster, Inc.*, 2006 WL 2458717, at *8 (N.D. Cal. 2006).
25 Motions to strike “should not be granted unless it is clear that the matter to be stricken could
26 have no possible bearing on the subject matter of the litigation.” *Id.* (citation omitted).
27 Although motions to strike are generally disfavored, they “are proper when a defense is
28 insufficient as a matter of law.” *Torres v. Goddard*, 2008 WL 1817994, *1 (D. Ariz. 2008)

1 (citing *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045,
2 1057 (5th Cir. 1982)).

3 The Bernals argue that all Daewoo's affirmative defenses are insufficient because
4 they do not contain factual support as required by Federal Rule of Civil Procedure 8(b).
5 Dkt. #19 at 3-4. Rule 8(b), however, does not apply to affirmative defenses. Rule 8(c)
6 applies and requires a party to "affirmatively state any avoidance or affirmative defense."
7 It does not contain the language from Rules 8(a) or 8(b) requiring a "short and plain
8 statement" or "short and plain terms." The Court will not strike Daewoo's affirmative
9 defenses on the ground that they do not comply with Rule 8(b).

10 The Bernals also argue that six of Daewoo's 17 affirmative defenses – statute of
11 limitations, statute of repose, assumption of the risk, notice of claim, collateral source, and
12 statutory cap – are insufficient as a matter of Arizona law and should be stricken with
13 prejudice under Rule 12(f). The Court will consider these six affirmative defenses in turn.

14 **A. Statute of limitations.**

15 Daewoo has asserted as an affirmative defense that "Plaintiffs' claims are barred by
16 the applicable statute of limitations." Dkt. #16 at 7. The Bernals, however, assert that they
17 complied with all applicable statutes of limitation. Under Arizona law, product liability
18 claims, failure to warn claims, and wrongful death claims must be brought within two years
19 of the accrual of the claim. A.R.S. §§ 12-542, 12-551. Survival actions and loss of
20 consortium claims also have a two year limitation, as they also arise from injuries to person.
21 A.R.S. § 12-542. The Bernals assert that they complied with the two year limitation because
22 the claim accrued on July 28, 2007 – the date of the accident – and the Bernals filed the
23 present case on July 21, 2009, less than two years later. Dkt. #19 at 4-5. Daewoo does not
24 dispute these dates.

25 The Bernals also claim that they complied with the statute of limitations for their
26 breach of warranty claim, which they assert could be either two years or four years
27 depending on whether the claim sounds in contract or tort. *See* A.R.S. §§ 12-542, 47-2725
28 (indicating that there is a two year period for breach of warranty claims arising out of

1 personal injury and a four year period for contract disputes). Under A.R.S § 47-2725,
2 however, a breach of warranty action based on contract must be brought within four years
3 of accrual of the cause of action, which generally occurs “when tender of delivery is made.”
4 The Bernal's did not inform the Court when they received their vehicle from Daewoo, so the
5 Court cannot determine whether four years passed between “tender of delivery” and the date
6 the Bernal's brought suit. A.R.S § 47-2725. As a result, the Court cannot conclude that no
7 applicable statute of limitations could bar the Bernal's' claims. The Court will not strike the
8 defense.

9 **B. Statute of repose.**

10 Arizona recognizes a statute of repose in actions based in contract, but not in
11 negligence claims. A.R.S. § 12-552; *see Flagstaff Affordable Housing Ltd. P'Ship v. Design*
12 *Alliance, Inc.*, 212 P.3d 125, 132 (Ariz. App. 2009); *Fry's Food Stores of Ariz., Inc. v.*
13 *Mather & Assoc., Inc.*, 900 P.2d 1225, 1227 (Ariz. App. 1995). Given that the Bernal's assert
14 a breach of warranty claim based upon “certain express and implied warranties” including
15 the warranty of merchantability and the warranty of fitness for a particular purpose, the Court
16 cannot hold that the Bernal's' action is based entirely in tort and not in contract. Dkt. #1,
17 ¶ 51; *see* A.R.S. § 47-2314 (indicating that the warranty of merchantability and the warranty
18 of fitness for a particular purpose arise from contract); Am. L. Prod. Liab. 3d § 18:34 (stating
19 that breach of warranty actions sound in contract). The Court cannot strike the defense on
20 this ground.

21 **C. Assumption of the risk.**

22 To “invoke the doctrine of assumed or incurred risk there must be either a risk or
23 danger which the plaintiff knows of or appreciates, or the danger must be so obvious that the
24 plaintiff will be presumed to have known and comprehended it.” *Miller v. George F. Cook*
25 *Constr. Co.*, 370 P.2d 53, 54 (Ariz. 1962). Whether the Bernal's assumed the risk generally
26 is a question of fact for the jury. *See A Tumbling-T Ranches v. Flood Control Dist. of*
27 *Maricopa County*, --- P.3d ---, 2009 WL 3245447, *19 (Ariz. App. 2009). As a result, the
28 Court cannot strike this defense on the ground that it is insufficient as a matter of law.

1 **D. Notice of claim.**

2 Plaintiffs argue that there is no notice of claim requirement under Arizona law unless
3 the defendant is the state or federal government. *See* A.R.S. § 12-821.01. Daewoo does not
4 dispute this contention. As a result, the Court finds the notice of claim defense insufficient
5 as a matter of law and will strike it with prejudice.

6 **E. Collateral source.**

7 In Arizona, this defense applies in contract actions but not in tort actions. *See*
8 *Norwest Bank (Minn.), N.A. v. Symington*, 3 P.3d 1101, 1109 (Ariz. App. 2000); *Grover v.*
9 *Ratliff*, 586 P.2d 213, 215 (Ariz. App. 1978); *Silverson v. U.S.*, 710 F.2d 557, 559 (9th Cir.
10 1983). Because the Bernal's breach of warranty action may sound in contract, the Court
11 cannot now hold this affirmative defense legally insufficient. The Court will not strike this
12 affirmative defense with prejudice.

13 **F. Statutory cap.**

14 The Bernal's assert that there are no constitutional or statutory limitations on the
15 amount of recovery in the present action, and Daewoo has not pointed to any. The defense
16 will be stricken with prejudice.

17 **G. Summary.**

18 At this early stage of the litigation, the Court can conclude that only two of Daewoo's
19 affirmative defenses are insufficient as a matter of law – notice of claim and statutory cap.
20 The Court will strike these defenses with prejudice, but otherwise will deny the Bernal's
21 motion to strike.

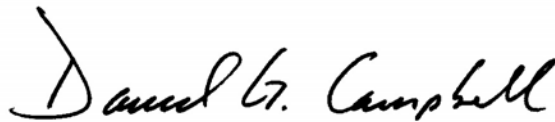
22 **IV. Daewoo's claim for attorneys' fees.**

23 Arizona law generally does not permit the recovery of attorneys' fees unless provided
24 by statute or agreement of the parties. *See U.S. Fid. Guar. Co. v. Frohmiller*, 227 P.2d 1007,
25 1008 (Ariz. 1951). Arizona statutes provide for attorneys' fees when the claim "aris[es] out
26 of a contract," or when the "claim or defense constitutes harassment" or "is not made in good
27 faith." A.R.S. § 12-341.01. The Bernal's argue that Daewoo cannot recover attorneys' fees
28 because none of the claims sound in contract. As discussed above, however, the Bernal's

1 breach of warranty claim may sound in contract. *Chaurasia v. Gen. Motors Corp.*, 126 P.3d
2 165, 174 (Ariz. App. 2006) (“Time after time, Arizona courts have held that a claim for
3 breach of warranty does arise out of contract for purposes of A.R.S. § 12-341.01(A).”).
4 Moreover, Daewoo could be entitled to attorneys’ fees for other reasons under A.R.S. § 12-
5 341.01. Given these facts, the Court will not strike Daewoo’s claim for attorneys’ fees.

6 **IT IS ORDERED** that Plaintiffs’ motion to strike (Dkt. #19) is **granted in part and**
7 **denied in part** as set forth above.

8 DATED this 16th day of November, 2009.

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12 David G. Campbell
13 United States District Judge
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